STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

GLORIA B. WILLIAMS
2 Colony Blvd., Bldg. 1
Apt. 102 Colony North
Wilmington, DE. 19802

Charging Party,

v.

RUDY NORTON, UniServ Director
Delaware State Education Association
Suite 205
Prices Corner Center
Wilmington, DE. 19808

JO A. CALLISON, President
Christina Affiliate, Inc., NCCEA/DSEA/NEA
Christiana High
Salem Church Road
Newark, DE. 19711

Respondents.

U.L.P. No. 85-10-006

DECISION

The dispute presented for resolution results from an alleged unfair labor practice in violation of section 4007 (b)(1) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1982), hereinafter referred to as the Act. The charge was filed on October 16, 1985 by Ms. Gloria B. Williams (hereinafter Charging Party) against Mr. Rudy Norton, as Agent of the Christina Affiliate, Inc., NCCEA/DSEA/NEA and Ms. Jo A. Callison, as President of the Christina Affiliate, Inc., NCCEA/DSEA/NEA, (hereinafter Respondents). The respondents filed their Answer on October 22, 1985 and Charging Party filed her Response on November 1, 1985. A hearing was held on January 7, 1986.

FACTS

The relevant facts are determined to be as follows:

All certified professional teachers in the Christina School District comprise a bargaining unit which is represented by the Christina Affiliate, Inc., NCCEA/DSEA/NEA. Mr. Rudy Norton is the authorized Delaware State Education Association (DSEA) staff representative assigned to service the Christina Affiliate, Inc., and Ms. Jo A. Callison is the President of the local association. Charging Party is in the bargaining unit but she is not a member of the Christina Affiliate, Inc.

Ms. Gloria B. Williams, Charging Party, is currently employed as an art teacher in the Christina School District wherein she is primarily assigned to the Leasure Elementary School. Prior to her employment in the Christina District Charging Party also taught in both the New Castle County and the Wilmington School Districts. Since approximately 1983, Charging Party has been desirous of obtaining a transfer to a school nearer her home and, in this regard, has filed with the Christina District several requests for a voluntary transfer. During December, 1984, an unanticipated mid-year retirement created a vacancy in the art department at the Bancroft Elementary School. Aware of this pending vacancy, Charging Party promptly requested a transfer to the Bancroft School; however, a new teacher was hired from outside the District and permanently assigned to fill the Bancroft vacancy. Charging Party was advised by the District Personnel Director that mid-year transfers were not

permitted and that she should file a voluntary transfer request in the spring of 1985 for the following school year. Prior to May 1, 1985, Charging Party again filed a request for a voluntary transfer, specifically to the Bancroft School. When mid-August arrived and she had not yet received notice of a change in her assignment for the 1985-86 school year, Charging Party telephoned the Personnel Director and was informed that her transfer request had not been granted because there was no existing vacancy for an art teacher at the Bancroft School.

On September 17, 1985, and again on September 18, 1985, Charging Party attempted to contact Mr. Rudy Norton by telephone. Mr. Norton was not available to receive her calls but did telephone Charging Party during the evening of September 18, 1985. A discussion ensued concerning Charging Party's frustration over her inability to obtain a transfer to the Bancroft School and her desire to file a grievance protesting the permanent assignment of a newly hired teacher to the vacancy created by the mid-term retirement of the Bancroft art teacher. Mr. Norton advised Charging Party that under the terms of the collective bargaining agreement the District was not required to transfer teachers during the course of the school year and, in fact, did not normally do so. Mr. Norton explained that the practice of the District was to fill a mid-year vacancy with a new hire thereby minimizing disruptions to both teachers and students. Charging Party was also advised that, in accord with the terms of Article III of the collective bargaining agreement, she had fifteen (15) days from the mid-August date of notification that her transfer request had been denied in which to file a grievance. Mr. Norton's opinion was that

the fifteen (15) day filing period had long since passed and the submission of a grievance would be untimely. Unsatisfied, Charging Party again telephoned Mr. Norton on September 19, 1985 to further pursue her complaint. It was during this telephone conversation that Mr. Norton allegedly stated that he did not have to represent Charging Party because she was not a member of the association and encouraged her to join the organization. Mr. Norton admits that as a dedicated representative he always encourages nonmembers to join the association; however, he denies ever conditioning representation on membership status. During this conversation, Charging Party requested that grievance forms be sent to her. In response to this request, a staff member of the Delaware State Education Association office inadvertently mailed the wrong grievance forms ; however, the error was promptly discovered and the proper forms were mailed to Charging Party within two days of her request.

On September 19, 1985, Charging Party also wrote a letter to the District Personnel Director wherein she requested the reasons for the denial of her transfer request to the Bancroft School. The Personnel Director responded in a letter dated October 9, 1985, to which there was attached a copy of a letter from him to Charging Party, dated November 2, 1984, which stated, in part:

> "...we do not allow voluntary transfers after the start of the school year, therefore, you cannot have a voluntary transfer to the Bancroft art position. You may submit a voluntary transfer request prior to May 1, 1985, for the summer of 1985.

Charging Party denies ever receiving or seeing this letter prior to

October, 1985.

Thereafter, on October 7, 1985, Charging Party met, at her request, with the Director of Elementary Education for the Christina School District to discuss her complaint. A written response, dated October 14, 1985, was mailed to Charging Party denying a violation of any contract provision and advising her of her right to file a grievance, if she wished to pursue the matter further. Although the exact date is unclear, a grievance was subsequently filed.

On Friday, October 11, 1985, Charging Party telephoned Ms. Jo Callison, President of the Christina Affiliate, Inc., to advise her that a grievance had been initiated and to inquire as to whether or not she was entitled to representation by the association. Ms. Callison responded that as the newly elected president she was not sure of the association's responsibility in this area but would check with Mr. Mike Epler, the former president, and get back to Charging Party. At no time thereafter did Ms. Callison contact Charging Party.

As a result of these actions by Mr. Norton and Ms. Callison, this unfair labor practice charge was filed.

POSITIONS OF THE PARTIES

CHARGING PARTY:

Charging Party contends that the respondents have engaged in conduct which interferes with, restrains or coerces her because of her exercise of a right guaranteed under the Act, i.e., to not become a member of the education association. Specifically, Charging Party

alleges that during her telephone conversation with Mr. Norton on September 19, 1985, he advised her that he did not have to represent her because she was a not a member of the association and impliedly, if not expressly, attempted to pressure her into joining the organization. Charging Party contends that because she was not a member of the association, she was denied representation by Mr. Norton. Secondly, Charging Party contends that Ms. Callison, as president of the local association, was under a duty to determine whether or not the association would represent her and to communicate the association's position directly to her as she had requested and as Ms. Callison had indicated she would. Charging Party contends that by Ms. Callison's failure to respond, she was left in an unfamiliar and complicated position with no direction and no other place to seek guidance.

RESPONDENT NORTON:

Mr. Norton denies ever having refused to represent Charging Party, for any reason. He claims that because Charging Party was advised in mid-August that her request for a transfer to the Bancroft School had been denied, the contractual fifteen (15) day filing period had long since elapsed. Mr. Norton also contends that the District's procedure for filling the Bancroft vacancy was consistent with established practice and did not violate any provision(s) of the collective bargaining agreement. Despite his opinions, he arranged to provide Charging Party with the proper forms so that she could file a grievance and at all times thereafter was available for further guidance, if requested.

RESPONDENT CALLISON:

Ms. Callison contends that she first spoke with Mr. Norton about Charging Party's question concerning her right to be represented on October 14, 1985. Mr. Norton advised Ms. Callison that he was already involved in the matter and that if Charging Party wanted to be represented in this matter he would represent her. It was agreed that Mr. Norton would contact Charging Party and so advise her. Relying on this conversation, Ms. Callison did not attempt to follow up with Charging Party and, hearing nothing to the contrary, believed that the situation was being handled to Charging Party's satisfaction. Ms. Callison contends that once a staff representative is contacted concerning a request for representation, the practice is for that particular staff representative to contact the aggrieved party and follow up thereafter.

ISSUE

Whether Respondent Norton and/or Respondent Callison, by their actions as set forth above, engaged in conduct in violation of section 4007(b)(1) of the Act, as alleged?

OPINION

The duty of fair representation is a question of first impression before the Public Employment Relations Board. This issue has, however, been extensively litigated in the private sector both before the National Labor Relations Board and in the courts. The P.E.R.B. has previously recognized that in the absence of local

precedent interpreting the provisions of the Public School Employment Relations Act, there is a logical tendency to look to both the established federal law in the private sector and to developing public sector law in other jurisdictions for guidelines. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink School District, Del.P.E.R.B., U.L.P No. 1-3-84-3-2A (1984). While private sector precedent can be of value in reaching decisions in the public sector it does not necessarily provide an infallible basis for such decisions. Seaford Ed. Assn. v. Bd. of Ed. of Seaford School District, Del.P.E.R.B., U.L.P. No. 2-2-84 (1984).

The exclusive representative's duty to fairly represent members of the bargaining unit has long been established in the private sector and is based on the exclusive position of the certified bargaining representative under section 9(a) of the National Labor Relations Act. The United States Supreme Court formally adopted this doctrine and recognized the exclusivity of the certified bargaining representative in Vaca v. Sipes (386 U.S. 171 (1967)). Acting in its exclusive capacity, an employee representative has both power and control over the terms and conditions of employment and therefore over the working lives of the bargaining unit members. Belanger v. Matteson, R.I. Supr., 346 A.2d 124 (1976).

In drafting the Public School Employment Relations Act, the Delaware legislature expressly incorporated both the doctrine of exclusivity and the duty of fair representation. 14 Del.C. section 4004(a) states:

> The employee organization designated or selected for the purpose of collective bargaining by the majority of the

> employees in an appropriate collective bargaining unit shall be the exclusive representative of all employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. 14 Del.C. section 4004(a).

This mandate clearly requires that the exclusive representative shall not discriminate against or among those whom it is obligated to represent.

Having established the statutory duty of fair representation, it is necessary to examine the nature of the obligation and the standard by which it is to be measured. As early as 1953, the United States Supreme Court held that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents" (Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)). It further refined this premise when it defined the duty to represent unit employees without discrimination as "...the obligation to serve the interests of all members without hostility ...toward any, to exercise discretion with complete good faith and honesty, and to avoid arbitrary conduct" (Vaca v. Sipes, Supra.). The underlying logic of Ford Motor Co. and Vaca provides a realistic and persuasive approach in defining the scope of the duty of fair representation and is consistent with the standard contained in section 4004(a) of the Public School Employment Relations Act. Consequently,in order to meet its statutory obligation to represent its members without discrimination an exclusive employee representative has a duty to act honestly, in good faith and in a nonarbitrary manner. These factors form the basis of every fair representation case and must, therefore,

be evaluated on a case by case basis.

In the present matter, the primary incidents relied upon by Charging Party to support her claim are the alleged statement by Respondent Norton during their telephone conversation of September 19, 1985, that he did not have to represent her because she was not an association member and the failure of Respondent Callison to advise her of the association's position on the representation question.

Concerning the involvement of Mr. Norton, while his actions may be personally unacceptable to Charging Party, they do not constitute a breach of the duty of fair representation. As to the alleged comment regarding the lack of obligation to represent a nonmember of the association, the record contains only the assertion by Charging Party and the denial by Mr. Norton. It is difficult to believe that a union representative of Mr. Norton's tenure and current position would blatantly and expressly refuse representation to a bargaining unit member simply because the potential grievant was not an association member. On the other hand, Charging Party effectively represented herself as a concerned teacher who genuinely believes that she has been deprived of her right to representation; thus, we are faced with a classic credibility issue which can only be resolved through an analysis of the surrounding facts and circumstances. Although Charging Party's attempts to contact Mr. Norton on September 17 and 18, were unsuccessful, Mr. Norton did return her calls during the evening of September 18, 1985. There is no dispute that during this telephone conversation Mr. Norton advised Charging Party of the weaknesses he believed existed with her claim; specifically the lack

of any violation of the collective bargaining agreement and the expiration of the contractual time limitations for the filing of a grievance. Upon the request of Charging Party, Mr. Norton promptly contacted his office and arranged for the proper grievance forms to be forwarded to her. The fact that incorrect forms were sent on September 18 is not material since this inadvertent error, by someone other than Mr. Norton, was promptly discovered and corrected without prejudice to Charging Party.

The collective bargaining agreement also provides assistance in resolving this issue. Article III, Grievance Procedure, at paragraph 3.1.1, defines a grievance as "a written claim by an employee that the terms of the collective bargaining agreement have been violated, misinterpreted or misapplied resulting in the abridgement of rights granted to the employee by the Agreement". Paragraph 3.1.2 alternatively defines a grievance as a written claim by the association of the abridgement of rights granted to it by the agreement. Clearly, it is the contractual responsibility of the individual employee, not the association, to file a grievance protesting a perceived individual wrong. The steps for an employee to follow in the filing and processing of a complaint are clearly set forth in section 3.5. The first step is an informal meeting between the employee and an appropriate representative of the District. This meeting was held between Charging Party and the Director of Elementary Education on October 7, 1985. Thereafter Charging Party filed a grievance which was processed through step 3 of the grievance procedure and remained active as of the date of the hearing on this charge. Although Charging Party made no request, Mr. Norton did

attend the step 3 meeting, which was the first actual grievance meeting following the pre-grievance discussion between Charging Party and Dr. Russell on October 7, 1985.

Although unacceptable to Charging Party, Mr. Norton did advise her of his opinion on both the substantive and procedural merits of her complaint. His uncontradicted testimony was that his positions were consistent with the contractual language concerning the time limitations and with both the contractual language and the established practice within the District concerning the mid-year transfer denial. His efforts to provide the requested grievance forms were conducted in a timely manner and he was present at the step 3 grievance meeting. Simply put, these documented and unrefuted actions by Respondent Norton are inconsistent with a breach of the duty of fair representation.

Concerning the charge againt Ms. Callison, her testimony established that she spoke with Mr. Norton on Monday, October 14, 1985, and had been assured by him that he would represent Charging Party, if she so desired. Because Ms. Callison teaches at a different school from Charging Party and does not have immediate or unlimited access to a telephone, she requested of Mr. Norton that he follow up with Charging Party and relay that information to her. Mr. Norton agreed to do so. Ms. Callison testified that it is the common practice that when a member calls her and requests representation she usually calls the DSEA office and asks one of the UniServ representatives to contact the aggrieved person. According to her testimony, Ms. Callison again spoke with Mr. Norton on the following day, Tuesday, October 15, 1985, to determine whether or not he had

been in touch with Charging Party. She was advised by Mr. Norton that he had indeed contacted Charging Party and advised her that while he did not believe she had a valid grievance, he would represent her if she wished to pursue the matter further. Considering the intervening weekend during which Ms. Callison was away, the record reflects a sincere and timely effort on her part to obtain an answer for Charging Party and to have that answer communicated to her. The undisputed testimony establishes that Respondent Callison acted not only responsibly but also consistent with the manner in which she had handled previous requests for representation. She referred the matter to the individual whose responsibility it was to actually represent Charging Party and, without further communication from Charging Party to the contrary, reasonably relied upon the assurances of Mr. Norton that he would, and indeed had, contacted Charging Party.** Considering all the evidence, the record is void of any credible evidence of dishonesty, bad faith or arbitrary treatment of Charging Party by Respondent Callison.

During her testimony, Charging Party stated that she could not believe that there was not a law someplace that would permit a senior employee with a favorable record to obtain a transfer to a vacant position before that position was permanently filled with a new hire.

** Although there is a factual dispute as to whether or not Mr. Norton did, in fact, contact Charging Party, it is immmaterial since, absent notice to the contrary, Respondent Callison was entitled to reasonably rely on Mr. Norton's assurances.

This statement, I believe, represents the crux of the real issue here, and that is the frustration of Charging Party over her inability to obtain the desired transfer. Despite her dissatisfaction with the inability of the collective bargaining agreement and/or the association or its representatives to satisfy her desire, there is no credible evidence of bad faith or arbitrary behavior by either respondent. In the day to day administration of the collective bargaining agreement, the representatives of the association are required to make good faith judgments and to take action, if any, consistent with the provisions of that agreement. To do otherwise may well constitute bad faith bargaining and/or a breach of the duty of fair representation, for which the association may be held accountable either through an unfair labor practice charge filed by either the employer or by an employee whose contractual rights have thereby been violated. In the give and take process of collective bargaining the terms of the negotiated contract are controlling and they do not necessarily provide a remedy for every perceived individual wrong.

CONCLUSIONS OF LAW

1. The Christina Affiliate, Inc., NCCEA/DSEA/NEA is an Employee Organization with the meaning of 14 Del.C. sec. 4002(g).

2. The Christina Affiliate, Inc., NCCEA/DSEA/NEA is the Exclusive Bargaining Representative of the certificated professional employees of the Christina School District within the meaning of 14 Del.C. sec. 4002(j).

3. Respondent Norton is the authorized Delaware State Education Association (DSEA) staff representative assigned to service the local education association, Christina Affiliate, Inc.

4. Respondent Callison is the President of the local education association, Christina Affiliate, Inc.

5. There is insufficient proof to establish that respondent Norton, by his actions, as set forth above, engaged in conduct in violation of 14 Del.C. sec. 4007(b)(1) as alleged.

6. There is insufficient proof to establish that respondent Callison, by her actions, as set forth above, engaged in conduct in violation of 14 Del.C. sec. 4007(b)(1) as alleged.

IT IS SO ORDERED.

Charles D. Long, Jr.
CHARLES D. LONG, Executive Director
Delaware Public Employment Relations Board

Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD, Princ. Asst.
Delaware Public Employment Relations Board

ISSUED: MARCH 7, 1986